**Lasher Service Corporation *and* Machinists and Mechanics Lodge No. 2182, District Lodge No. 190, International Association of Machinists and Aerospace Workers, AFL–CIO.** Case 20–CA–29138

October 23, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 30, 2000, Administrative Law Judge Joan Weider issued the attached decision. The Charging Party filed an exception and supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

In her decision, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union requested information concerning the parts department bonus plan and the union-security proposals under negotiations. In her recommended Order, the judge provided for conditional disclosure of the requested information. Specifically, the judge afforded the Respondent 30 days to bargain with the Union toward a confidentiality agreement or protective order before the Respondent would be required to disclose the requested information to the Union.

In its exception, the Union argues that the Respondent should be ordered to provide the requested information outright. For the reasons set forth below, we agree.

The judge found that the Respondent made a *claim* of confidentiality. The judge also found that "[*i*]*n the event* the Respondent's confidential concerns are valid . . . conditional disclosure is warranted." (Emphasis added.) The judge erred because the Respondent must *establish* confidentiality as a defense, not merely raise a naked confidentiality claim. E.g., *Retlaw Broadcasting Co. v. NLRB*, 172 F.3d 660, 670 (9th Cir. 1999) ("When raising confidentiality as a justification for non-disclosure, the employer has the burden of *establishing* a legitimate claim of confidentiality") (emphasis added); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995) ("[T]he party making a claim of confidentiality has the burden of proving that such interests are in fact present"). Here, by asserting confidentiality, the Respondent assumed the burden of coming forward with evidence to back its position, and it has not done so. Therefore, the Respondent has not established its confidentiality claim.[1] Accordingly, the Respondent must supply the requested information.[2] Id.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lasher Service Corporation, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Furnish to the Union in a timely fashion the requested parts department bonus plan and union-security information referred to above in paragraph 1(a)."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Machinists and Mechanics Lodge No. 2182, District Lodge No. 190, International Association of Machinists and Aerospace Workers, AFL–CIO, by refusing to furnish the Union with the requested parts department and union-security information that is relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our bargaining unit. The bargaining unit is:

> All employees covered by the 1996–1999 collective-bargaining agreement between Lasher Service Corporation and the Union; excluding all other employees, guards and supervisors as defined in the Act.

[1] *Exxon Co. USA*, 321 NLRB 896 (1996), cited by the judge, is distinguishable. In that case, unlike here, the Board specifically found that the respondent "*established* a legitimate confidentiality concern." (Emphasis added.) Id. at 898.

[2] We find it unnecessary to pass on the judge's findings in sec. III, par. 12 of her decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely fashion the requested parts department and union-security information referred to above.

LASHER SERVICE CORPORATION

*Jonathan J. Seagle, Esq.*, for the General Counsel.
*N. Paul Shanley, Esq*., of Sacramento, California, for the Respondent.
*James Beno* and *Mark Martin,* Machinists Lodge 2182, for the Charging Party.
*David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger, & Rosenfeld)* (in joiner on brief with Counsel for the General Counsel), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on January 12, 2000,[1] at Sacramento, California. The original charge was filed by the Machinists & Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union or the Charging Party) on May 18, 1999, against Lasher Service Corporation (Lasher or Respondent). The Regional Director for Region 20 issued a complaint and notice of hearing on September 7, 1999, which was amended December 23 and at hearing, alleging Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Specifically, the complaint asserts Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information it requested in two letters, both dated May 5.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts it provided some of the requested information; some of the requests were too vague to permit an answer, and some of the information was confidential. Respondent requests dismissal of the complaint in its entirety. For the reasons stated below, Respondent's motion for a directed verdict dismissing the complaint is denied.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing brief of Respondent and the oral argument of counsel for the General Counsel, I make the following[2]

[1] All dates are in 1999 unless otherwise indicated.

[2] I specifically discredit any testimony inconsistent with my findings.

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the complaint, as amended, I find Lasher Service Corporation meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

Respondent is a corporation with an office and place of business in Sacramento, California, and is engaged in the retail sale and service of automobiles and the retail sale of automotive parts. Respondent admits the appropriate unit of mechanics, body shop technicians, and parts employees[3] for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All employees covered by the 1996–1999 collective-bargaining agreement between Respondent and the Union; excluding all other employees, guards and supervisors as defined in the Act.

The collective-bargaining agreement expired March 13, 1999. The agreement contained a union-security clause. Respondent argued at hearing this provision was illegal, it failed to adduce any evidence in support of this claim. Respondent did not raise this claim during negotiations. Accordingly, I find this bare claim to be without merit. The expired collective-bargaining agreement also had provisions concerning the hourly wages of the parts employees.

In preparation for the expiration of the agreement, Respondent and the Union commenced negotiations for a successor agreement about January 22. There were other negotiating sessions around February 12, March 30, either April 9 or 21, and April 30. The Union was represented at the negotiating sessions by Mark Martin and James Beno, and Respondent was represented by N. Paul Shanley and/or Mark and Scott Lasher, the owners of the Lasher. Respondent gave the Union its first written proposal on March 12, the day before the collective-bargaining agreement expired. This proposal, consonant with Respondent's position throughout the negotiations, sought elimination of all union-security requirements from the contract. The Union sought retention of the union-security requirements throughout the negotiations. Respondent also proposed a parts bonus or incentive plan.

*B. The April 30 Negotiations*

At the commencement of the negotiations on April 30, the Union presented Respondent a written proposal suggesting the resolution of the remaining open issues. Respondent caucused, agreed to some terms, suggested modifications of other terms, and sought the elimination of the union-security provisions and implementation of a parts incentive program. The Union then caucused and revised their position to be a "package offer" according to Beno, "indicating that we could accept the economic proposals that were on the table, as long as the union-security clause remained in the contract, that if that were acceptable to the company, then we could basically enter into a tentative agreement, subject of course to ratification by the employees in the shop."

[3] The parts employees were also referred to as countermen.

Beno defined the term "package offer" as:

> Basically the offer comprised of probably about five or six different issues, and basically stating that if the entire package was acceptable, then it was all right. If even a portion of the package was not, then it's basically we're back to bargaining again, because it's kind of an accept the whole thing concept or, if it's not acceptable, then we go back to negotiating because the issues are still considered opened.

Respondent's representatives again caucused, and on their return to bargaining indicated agreement with the union proposal except for retention of the union-security provisions. The parties discussed the reasons for Respondent's position concerning the union-security provisions. The Union asked Respondent why there was a problem with the provision since prior collective-bargaining agreements between them contained these provisions. Lasher informed the Union that it "had problems in the past with hiring employees that were going to go to work for them but when they found out it was a union shop, and they were going to be required to have to join the union and pay fees and dues, that they wouldn't come to work for them." Respondent also stated it felt employees should have the freedom to choose and not be constrained by union-security provisions.

In response, Martin, the Union's chief negotiator, noted this was the first time the Union was informed the union-security provisions purportedly caused hiring problems and, according to Beno, inquired if Respondent could provide the Union with "some information or show us where you've had a problem with hiring people, because as far as we were concerned, there had never been a problem with that."[4] Respondent replied it was not obligated to provide this information and raised confidentiality concerns, stating they needed to protect the privacy of job applicants. At no time did Respondent and the Union agree to the elimination of the union-security provisions and parts bonus incentive plan. Respondent stipulated to the accuracy of Beno's testimony concerning this negotiating session.

*C. The Union-Security Information Request*

On May 5, the Union sent Respondent two information requests. Respondent replied to these requests on May 13, 1999. The General Counsel asserts some of the requested information is relevant and Respondent's reply failed to provide the information. The first items in issue are:

> 1. Names, addresses and phone numbers of applicants for bargaining unit positions over the past five (5) years.
>
> . . . .
>
> 3. Names, addresses and phone numbers of all prospective employees who have refused to be employed at your dealership because of the requirement to join the union and pay monthly dues.
>
> 4. Identify any job openings within the bargaining unit that have remained vacant or that the company has been unable to fill as a direct result of the union-security clause.
>
> . . . .
>
> 7. For item #6[5] above, identify any job opening that went unfilled and the length of time it went unfilled as a result of an employee refusing to work in the position because he/she did not want to join the union or pay union dues. Please identify the individual by providing name, address and phone number.
>
> 8. List of any employee(s) who have been discharged by your company in the past five (5) years for their failure to comply with the union-security clause.

According to Beno, who drafted the letter, the information was requested to permit the Union to independently confirm if any job applicants had refused employment with Respondent because of the union-security clause. The Union was skeptical there was actually a problem induced by the union-security clause and sought independent confirmation of Respondent's claims. Thus, it desired information substantiating the claim there were job openings that were not filled because the applicants objected to joining the Union or becoming core members. If the Union independently confirmed the union-security clause did indeed cause a barrier to hiring qualified new employees, it could use the information developed with the information to develop future proposals or lead to the withdrawal of their request for the inclusion of the union-security clause in the new collective-bargaining agreement. Similarly, the Union sought information concerning the termination of any employees because they refused to join the Union as another means of confirming the claim the union-security clause created problems in hiring for unit positions at Respondent's dealerships.

Respondent's May 13 reply answered the above-quoted inquiries, ad seriatim, as follows:

> 1. This request is an invasion of privacy for our applicants, as well as a violation of the California Constitution. Further, it is irrelevant pursuant to the answer to number three below.
>
> . . . .
>
> 3. Do not recall.
>
> 4. Do not recall.
>
> . . . .
>
> 7. Do not know. Not applicable.
>
> 8. Do not know.

The Union did not receive any information related to this request after receipt of Respondent's May 13 letter. During cross-examination, Respondent attempted to equate its "do not recall"

[4] Beno testified in an open and direct manner. Based on his demeanor, his testimony is credited. Also, he demonstrated clear recall of the events and his testimony was unrefuted.

[5] Item 6 is not alleged by the General Counsel to be relevant information which Respondent failed to provide to the Union. Item 6 in the Union's letter requested the staffing levels at a number of Respondent's dealerships for the past 5 years, specifically technicians/mechanics, body shop and parts department employees, by classification, at Respondent Volkswagen, Dodge, Acura, Isuzu, and Audi dealerships.

Respondent claims inasmuch as item 6 in this request was not deemed relevant by the General Counsel item 7 should be similarly deemed not relevant. The information requested in item 7 is not dependent upon the provision of the information sought in item 6. Item 7 directly addresses the issue raised by Respondent during negotiations for the successor collective-bargaining agreement, the claimed need for the elimination of the union-security clause. For the reasons stated below in greater detail, I find the information requested in item 7 of the union-security letter is relevant.

responses to a claim of unavailability, that it did not maintain such records. Respondent did not present any testimony and there is no documentary or other record evidence. The "do not recall" and "do not know" responses fail to accurately reflect any claim the requested records do not exist or are otherwise legitimately unavailable. Respondent did not adduce any testimony concerning what, if any, records it maintains concerning job applicants, reasons for refusing employment, or reasons for leaving employment. There is no evidence Respondent does not maintain such records and no explanation why Respondent, in its reply letter, did not inform the Union it did not maintain the requested information. Respondent never adduced any evidence it researched its documentary or electronic files and determined there were no records of the nature sought by the Union.

To the contrary, during the April 30 negotiating session, when the Union requested information confirming Respondent's union-security claims, Respondent replied the information was confidential; that Respondent was not required to provide the information. This answer indicates at least some of the requested information exists and is retained by Respondent. That there was no claim of unavailability until trial and such claim was made without any supporting evidence such as testimony, further indicates some of the requested information is retained by Respondent.

Martin was asked if he would be surprised to learn Respondent did not keep records of applicants and copies of applications. He replied he would be surprised because, if applicants were in fact refusing employment because of the union-security provisions, he "would consider that to be a serious issue and I would want to keep records on it." When asked if Scott Lasher informed him Respondent did not keep such records, Martin replied: "I believe Scott Lasher's response to the company, or to you in our April 30th meeting was, 'We don't have to dig up that shit, do we?' I believe, I believe." This testimony was not refuted. Martin testified in a direct and convincing manner, and based on his demeanor, his testimony is credited. I find Scott Lasher's statement is another indication Respondent does keep such records.

Martin further testified:

> I guess had the issue not been brought up in negotiations as a real problem of the employer, why would the employer bring up an issue if it didn't have support for its position, that's why I had suspected that the employer would have such records if it indeed was an honest position for the employer to take.

Respondent never explained why it responded to several of the information requests that it did not recall rather than that it did not retain such records. This failure adds further support to the conclusion Respondent never informed the Union it did not have the requested information and is another indication some, if not all, of the requested information is retained by Respondent.

*D. Information Request About Parts Department Bonus Plan*

Also on May 5, the Union requested information from Respondent concerning its proposed compensation package for unit members in the parts department. Beno testified convincingly that Respondent initially proposed to freeze the parts department employees' hourly compensation to the current rate. Subsequently, Respondent proposed a bonus program. Respondent gave the Union its proposed bonus plan for the parts department employees. The proposal used different gross sales figures for Respondent's Dodge, Volkswagen, and Audi parts employees than its Acura and Isuzu parts department employees. It also gave two apparently hypothetical figures for each group of parts department employees as their possible bonuses.

The Union could not determine its members' actual compensation from Respondent's written proposal, as Beno testified:

> [I]t's awful hard to determine exactly how much that's going to put in the pockets of the parts employees on a monthly basis. So, we needed account data from the company at least up until the point of our negotiations, as far as their accounts, their manufacturers, the cost of the parts that they were paying to them, which would help us be able to put together an overall picture of how much of the gross profits each month would be generated, so that we could at least estimate for the parts individuals how much the bonus program would generate for them in money in their pocket, as far as their compensation package. And then with this information at least we could, if we had to develop further counter offers at the table, we would have at least the history in the parts department and at least a financial history for us to at least base the estimates on what the parts individuals would receive in their compensation package.

Accordingly, Beno requested information from Respondent to assist in determining what the parts department's employees would receive as compensation and to determine if they should prepare a counterproposal. The specific requests[6] here under consideration are:

> 2. Computations used by the Company to determined [sic] the monthly gross *profit* of the parts operations. [Emphasis in original.] This information should include the monthly gross sales figures less any cost offsets that are deducted from gross sales to determine gross profit.
>
> . . . .
>
> 4. Monthly accounts of the cost of parts paid to each individual manufacturer.
>
> . . . .
>
> 5. What is the Company/Dealer markup on all parts sold?
>
> 6. What is dealer gross profit on customer pay parts (Front Counter)?
>
> 7. What is dealer gross profit on warranty parts?
>
> 8. What is dealer gross profit on customer pay parts (Back Counter-Service Department)?
>
> 9. What is dealer gross profit on wholesale parts accounts?

[6] The Union prefaced its requests with the following statement:

> During the course of our contract negotiations, the Company has insisted that our Parts Department members accept an incentive plan proposal that would tie any future wage increases to the monthly gross profit of the Lasher Service Corporation's Parts Department operations. In order for the Union to give this proposal full and complete consideration and to evaluate its merit and impact on the Parts Department bargaining unit, we are requesting the following information:

. . . .

15. Profit and Loss statements for each Parts Department operations for the past three (3) years.

The Union specifically requested the above items to ascertain Respondent's markup on parts to determine the gross profits of each of the five parts departments. The request also indicated the Union wanted to know which particular costs the Respondent would use to determine gross profits. Charging Party wanted to be able to prepare a reliable estimate of the compensation the bonus proposal would generate for each affected employee. The Union indicated in some of the requests in this letter that the information was sought for a 3-year period. The Union concluded the letter by describing the requested information as "extremely important for the Union Negotiating Committee to properly evaluate the merits of the Employer's proposal and to develop an appropriate response and possible resolution." The Union sought a means of independently verifying the figures given by Respondent.

Martin further explained the Union was attempting to determine the actual cost of the parts. Martin clarified the request to the past 5 years to permit the Union to accurately project the compensation of its parts department members.

Respondent replied on May 12 to the May 5 letter as follows to the above-stated requests:

2. Sales less cost. This request is vague and ambiguous.

. . . .

4. This request is vague and ambiguous.

5. This request is vague and ambiguous. Varies per statement.[7]

6. This request is vague and ambiguous. Varies per statement.

7. This request is vague and ambiguous. Varies per statement.

8. This request is vague and ambiguous. Varies per statement.

9. This request is vague and ambiguous. Varies per statement.

. . . .

15. This request seeks proprietary information and is irrelevant. Only gross profit relevant.

About May 13, Respondent provided the Union with additional information which Beno believed:

> [I]t went back about three years, and the information was broke down into the Dodge, V.W., Audi, parts department, and then the Acura and Izuzu parts department, and was supposed to show on a monthly basis the sales in those departments, and then the gross profit on the specific dates that were basically next to the figures that are provided.

The Union did not consider this information adequate because:

> [B]asically the information provided, it was hard to independently verify, number one, the figures that were provided, because it was a, as you can see, it was handwritten on, it looks like a ledger, but there's nothing indicating the authenticity of it. And that's why, in our parts request, we were more detailed because we needed to be able to identify and confirm the authenticity of the figures that are given us.

Respondent argues this information meets the Union's parts department requests. I find this argument lacks merit. The information provided is not nearly as detailed as the information requested by the Union. The date provided merely gave monthly total sales and gross profit compilations without any indication if there were any differences between Respondent's various dealerships. There was no breakdown of the individual accounting items used to compile these computations. There was no indication of how these computations would translate as a bonus for each parts department unit employee. The costs, if any, deducted to compute gross profit were never identified. Accordingly, I conclude this document does not meet the Union's request for information nor does it render such request irrelevant.

While the Union during the last negotiating session agreed to accept the bonus proposal if the union-security provisions remained intact, I find making this counterproposal, which was not accepted by Respondent, does not constitute a waiver and does not relieve Respondent from its obligation to provide the Union with relevant information concerning the bonus plan which was still on the table. There is no clear and convincing evidence there was agreement on the bonus program absent Respondent's agreement to retain the union-security provisions. Moreover, the Union informed Respondent at the time it made its package counterproposal that if agreement was reached, the members would have to ratify the contract. Since agreement was not reached, there was no ratification, there is no agreement and/or waiver.

Respondent argues its proposal was clear on its face and needed no clarification because it was based on gross profit in the individual departments. Respondent did not make this claim in its replies to the information request at issue. The nature of the members covered was unclear on the record since Respondent, in its cross-examination, claimed the parts department member at the "downtown store" was not covered by the proposal. The Union understood all parts department members were covered by the proposal. While Respondent, during negotiations, defined gross profit as sales less costs, the Union was unsure if there were any offsets or other deductions in the computation of gross profits. Respondent never placed into evidence the accounting item or items included in costs. There is no evidence Respondent does not use any offsets such as shipping, storage, special order surcharges, etc., in calculating gross profit. There was no expert or other testimony gross profit computations never contain any offsets.

The Board informed Martin one of Respondent's concerns was it was unsure what timeframes were covered by the information requests. On September 17, Martin wrote Respondent and "for clarification," informed Respondent all the information requests for the parts department bonus plan and union-security matter were for a 5-year period. Martin did not consult with Beno before writing this letter. Martin received additional information as a

[7] During cross-examination, Respondent asked Beno if he knew Respondent's dealer markup changed daily and changed by item and by store. Beno responded no to these questions. There was no evidence adduced in this proceeding supporting Respondent's representations in these questions. When Beno was asked if he understood the phrase "varies per statement," he replied "I don't even know what a statement is."

result of his September 17 letter. Martin described the information as follows:

> For Acura I had received some printouts for two of the parts department employees. On sales volumes, I would have to guess. It just mentioned sales, then it mentions gross, then it mentions returns, then it mentions net sales, then it mentions GP percent. And then it has an RET percent. And I'm not quite sure what some of these figures mean, but we've also got an employee sales history for the Dodge employees that was provided, which followed a one year period of time, I believe.
>
> And we received parts sales figures for the V.W. store at 10 Van Ness, for 1995, 1996, 1997, 1998, and 1999.

Respondent claims, since the Union does not know what these documents reflect, and does not know if the material meets the parts department request, there can be no finding Respondent failed to provide the requested information thus the General Counsel has not met his burden of proof. I find this argument unpersuasive. As Martin noted in his testimony, the information provided by Respondent was not presented in the requested or any other manner to permit the Union to independently verify the data presented by Respondent.

## III. ANALYSIS AND CONCLUSIONS

Respondent claims that some of the requested information was unavailable, some is confidential, some requests are vague and unclear, and the requests in issue are also unclear because the Union did not specify the time period covered by each request. Respondent also questions the relevance of the requested information. There is no evidence Respondent ever sought clarification of the Union's information requests. Beno was never informed by Respondent that Lasher was having problems with some of his requests other than they were vague and ambiguous. Beno did not consider them vague and ambiguous.

During the course of the trial, Respondent's counsel raised the legality of the union-security clause as an issue, but never placed the provision in evidence and never adduced any proof that the provision was unlawful by its terms or application. There is uncontroverted testimony employees are permitted to become core members. Thus, I find this argument to be without merit.

Respondent also claims it cannot lawfully provide the personnel information concerning job applicants requested in the security clause request because of the privacy provisions of the California Constitution. As the Board found in *Holiday Inn on the Bay*, 317 NLRB 479, 483 (1995):

> Respondent argues that California courts have interpreted the privacy portion [of the State of California Constitution] provision to prohibit disclosure of personnel files of employees not involved in underlying litigation or in a dispute. Respondent, however, has pointed to no California case prohibiting disclosure of information from personnel files to a bargaining representative pursuant to the mandate of the Act. Nor could a state impose such a prohibition. "If employee conduct is protected under [Section]7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause." (Citations omitted.) *Brown v. Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491, 501 (1984). Section 7 of the Act expressly accords employees a right "to bargain collectively through representatives of their own choosing."

One of these rights is to have the unit employees' collective-bargaining representative knowledgeably represent them in negotiations for a successor collective-bargaining agreement, as is the case here.

It is unquestioned Respondent failed to provide the Union the requested union-security information and failed to provide the detailed information sought in the parts department letter. The Union requested information concerning the terms and conditions of employment of the parts department unit employees, i.e., what would their compensation likely be if the Union agreed to the proposed bonus program, and is there merit to Respondent's claims of adverse effects on hiring qualified employees because of the union-security provisions in past collective-bargaining agreements. The information requested in the parts department request clearly relates to the compensation of unit members and is thus presumptively relevant. These are individuals employed within the bargaining unit the Union represents thus, the parts department information request is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. The basis for the presumption is this information is at the core of the employee-employer relationship," *Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959), and is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971). Respondent has not clearly and convincingly rebutted this presumption of relevance.[8]

Indisputably, some of the records at issue here are those of nonunit employees and applicants who did not select the Union as their collective-bargaining representative and who may not be represented by the Union. However, Respondent made the items here under consideration in the union-security letter relevant for it made representations the union-security provisions caused job applicants to forego employment with Respondent, and thus Respondent insisted on the removal of those provisions from the successor collective-bargaining agreement. This position clearly affected the rights and representation of the unit members and therefore became relevant. The claimed inability to hire qualified employees because of the union-security clause also impacts on the unit employees this is another reason to find the union-security information request in response to Respondent's claims is relevant.

Assuming arguendo, the information requested was not presumptively relevant, I find the evidence establishes the information requests are relevant. As the Board found in *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994):

> The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and po-

[8] Respondent argues it has no duty to provide financial information to the Union because it did not claim inability to pay. I find this argument to be without merit in the circumstances of this case. Respondent made a wage proposal and the Union has the right to the information that would permit it to calculate the impact of the proposal upon the wages of the parts department employees it represents.

tential or probable relevance is sufficient to give rise to an employer's obligation to provide information.

As noted in *GTE California*, 324 NLRB 424, 426 (1997):

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its responsibilities regarding processing grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). . . .
>
> A Union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As the Supreme Court explained in [*Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979)] "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. See e.g. *Exon Co. USA*, 321 NLRB 896 (1996); *Good Life Beverage Co.*, 312 NLRB 1060 (1993); *Pennsylvania Power & Light Co.*, [301 NLRB 1104 (1991)]; *Howard University*, 290 NLRB 1006 (1988).

I find Respondent's claim the requested information does not meet the test of relevance unconvincing. Assuming the information is not presumptively relevant, the requests meet the broad standard of relevance and are sufficiently important or necessary to the Respondent's and Union's bargaining positions to invoke the statutory obligation of Respondent to comply with the request. *Postal Service*, 307 NLRB 429 (1992); *Columbus Products Co.*, 259 NLRB 220 (1981). The Union was seeking to independently verify if Respondent's claims during collective bargaining were valid. The Union's evidence amply demonstrated the probable and potential relevance of the requested information in fulfilling its statutory representative duties. It specifically requested the information to effectively represent unit members during negotiations for a successor collective-bargaining agreement. The record clearly demonstrates the Union had a reasonable and objective basis for its requests.

Respondent failed to convincingly demonstrate it did not have the information requested in the union-security letter. The reply letter to the parts department request only asserted do not recall or the information was private and the California Constitution precludes Respondent from providing the information. It was not until trial that Respondent's counsel claimed during questioning of the Union's agents that the information was unavailable. As found above, there is no clear and convincing evidence the requested information is totally unavailable. Respondent's proposals during collective bargaining provided sufficient demonstration of a nexus to a collective bargaining responsibility of the Union. As previously noted, these responses indicate at least some of the requested information is retained by Respondent. Respondent never sought clarification of the information requested by the Union; rather it asserted it did not have to provide the information, could not recall the information and, claimed confidentiality. The information requested clearly was relevant to the determination of whether Respondent's collective-bargaining proposals were based on valid representations and to reasonably determine the compensation of the parts department unit employees.

Respondent had an affirmative duty to request clarification if it did not understand the Union's entreaties. As the Board held in *National Electrical Contractors Assn., Birmingham Chapter*, 313 NLRB 770, 771 (1994): "[i]t is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Keauhou Beach Hotel*, 298 NLRB 702 (1990).[9] Respondent has failed to meet these duties in this case.

While Respondent made a broad claim some of the sought information was confidential, it never offered to negotiate means of protecting confidentiality; it never offered to redact names or other information or suggested other alternative means or conditions in meeting the Union's request. Moreover, the claim of confidentiality indicates the information is retained by Respondent and is not unavailable. Respondent made no offers of reasonable accommodation under these circumstances. I conclude Respondent has failed to demonstrate its confidentiality and propriety claims outweigh the Union's need for the information. As noted in *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995):

> The Supreme Court in *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979) found that, in certain situations, confidentiality claims may justify a refusal to provide relevant information, In making these determinations the trier of fact must balance the union's need for the information sought against the legitimate and substantial confidentiality interests of the employer. However, it is also well settled that as a part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information.

"The party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." *Pennsylvania Power & Light Co.*, 301 NLRB 1104 (1991). Here the Union agreed to keep the information confidential. The Respondent introduced no evidence it sought an accommodation and there is no evidence the Union would not have accepted any such accommodation. Respondent has provided the Union with some of the sought information in the parts department information request, thus undermining its claim of confidentiality of this information. There was no instance where the Union was shown to have broad-

[9] The Board held in *Keauhou:*

> Moreover, even if the Union's request was ambiguous and/or intended to include information regarding nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply. It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. See e.g. *A-Plus Roofing*, 295 NLRB 967, JD fn. 7 (1989); *Barnard Engineering Co.*, 282 NLRB 617, 621 (1987); and *Colgate-Palmolive, Co.*, 261 NLRB 90, 92 fn. 12 (1982).

cast confidential information provided by Respondent. There is no basis to conclude the Union would breach any promise to meet Respondent's confidentiality concerns.

Respondent has provided the Union with price information in the past regarding sale pricing and government contract prices. There was no instance where the Union was shown to have broadcast this information. There is no basis to conclude the Union would breach its promise to meet Respondent's confidentiality concerns. Respondent has also failed to demonstrate why its concerns in this instance are different from those instances where it has provided the Union with confidential price information, such as sale prices during promotions and government contract prices. Respondent admittedly had no reason to doubt the Union's promise and there was no instance shown where the Union breached a similar pledge.

In the event the Respondent's confidentiality concerns are valid, I find that conditional disclosure is warranted. Respondent will be afforded 30 days to bargain in good faith with the Union toward a confidentiality agreement or protective order that would accommodate the Union's need for the information while safeguarding the information from unnecessary disclosure. The Union has demonstrated its reliability in the past and was not shown to have divulged any price information. The Union has also expressed its willingness to sign such an agreement. Since Respondent, as the party asserting confidentiality, has not in the past sought to meet its responsibility to seek a reasonable accommodation,[10] if, after 30 days, no such agreement has been reached, the Respondent is to disclose the information. *Exxon Co. USA*, 321 NLRB 896 (1996).

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) as alleged in the complaint, by failing since March 4, 1997, to furnish the Union with the requested information.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees covered by the 1996–1999 collective-bargaining agreement between Respondent and the Union; excluding all other employees, guards and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the above unit.

5. By refusing to provide the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above violation is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information requested, which information Respondent was obligated to furnish, pursuant to Section 8(a)(5), I shall recommend, among other things, that conditionally, Respondent furnish the requested information which I have found it was legally obligated to furnish. I also recommend Respondent be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act, including the posting of a notice marked "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

## ORDER

The Respondent, Lasher Service Corporation, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with the Union by failing to furnish to the Union with the requested parts department and union-security information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request and, within 30 days from such request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding Lasher from unnecessary disclosure and, if there are no good-faith negotiations or we fail to reach agreement within this 30-day period, disclose the requested information to the Union without such agreement since the Union has been shown to honor past pledges of confidentiality.

(b) Within 14 days after service by the Regional Director, post at its Northern California offices, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be

[10] See *GTE California, Inc*., id.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since May 5, 1999.

(c) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.